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PUBLIC PROSECUTOR

v.

PHON NAM

HIGH COURT MALAYA, IPOH

PEH SWEE CHIN J

b

[CRIMINAL TRIAL NO. 5 OF 1984]

18 DECEMBER 1986

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CRIMINAL LAW AND PROCEDURE: *Dangerous drugs - Accused charged with trafficking in 128.80 grammes of heroin - Dangerous Drugs Act 1952 - Section 39B(1) - Prosecution failed to call a witness who served exhibits on the accused - Whether Court could exercise discretion under s. 425 of the Criminal Procedure Code to allow witness to be called after prosecution has closed its case.*

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The accused was charged with trafficking in 128.80 grammes of heroin under s. 39B(1) of the Dangerous Drugs Act 1952. The substances found by the police having been attributed to the accused were submitted to the chemist, whose reports stated that they were in fact heroin. An Inspector who gave the evidence about the chemist's reports stated that there were 2 exhibits, one consisting of the substances suspected to be heroin and the other the weighing scale and its case. The two exhibits were served by one DPC Yunan on the accused at the Taiping Prison and that the Inspector received the acknowledgment of receipt signed by the accused on the reports. When the prosecution closed its case, the defence having reserved its submission till the end of the whole case, it was found that the said DPC Yunan had never given evidence about the service by him of the exhibits on the accused. The prosecution then applied for leave to summon the said DPC Yunan under s. 425 of the Criminal Procedure Code by submitting that the Court should exercise its discretion, it being essential to the just decision of the case.

*e***Held:***f*

[1] The cardinal rule is that the prosecution must prove every ingredient of the offence before an accused person is called upon to enter on his defence. To prove any ingredient, there must be sufficient evidence, irrespective of whether it is required or not to prove such an ingredient beyond reasonable doubt.

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[2] The service of the exhibits had not been sufficiently proved at the close of the prosecution case because DPC Yunan who served them on the accused had not been called to testify the same. Without such evidence there was no sufficient evidence to prove the essential ingredient that the substances the accused was alleged to have trafficked in, were in fact heroin.

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[3] The system in our criminal trials in adversarial, and it behoves the Court, from its inherent nature, to take no active part in proving or disproving any essential fact for the prosecution or defence, in order to maintain its impartiality on the basis of which, public confidence is cultivated, and on such public confidence, the whole judiciary is rooted. Having regard too to the spirit of the criminal law and all other circumstances the Court declined to exercise its discretion under s. 425 of the Criminal Procedure Code.

[Accused acquitted and discharged without his defence being called.]

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Cases referred to:*Ramli bin Kechik v. PP* [1986] CLJ (Rep) 243*Maxwell v. The Director of Public Prosecutions* [1935] AC 309**Legislation referred to:**

Criminal Procedure Code, s. 425

Dangerous Drugs Act, s. 39B(1)

*For the public prosecutor - Tun Abdul Majid bin Tun Hamzah, DPP**For the accused - Karpal Singh; M/s. Karpal Singh & Co.***JUDGMENT****Peh Swee Chin J:**

The accused was acquitted and discharged without his defence being called on a legal point based on some evidence not disputed by both the prosecution and defence, and such being the case, apart from stating the barest outline of the prosecution case as a whole, but stating in detail the aforesaid undisputed evidence, it will be necessary to set out the details of the whole prosecution case.

The accused was charged with trafficking in 128.80 grammes of heroin under s. 39B(1) of the Dangerous Drugs Act. It cannot be gainsaid that it would be vital for the prosecution to prove that the substances which the police suspected to be heroin were in fact heroin, a vital ingredient of the offence in question. I do not think it necessary to cite any authority for the proposition, bearing in mind at the same time, that it was a capital offence.

There were two chemist's reports, stating that the substances found by the police and submitted to the chemist for analysis were in fact heroin, such substances having been found to be attributable to the accused.

The evidence about the chemist's reports is as follows. Insp. Mohd. Sakri bin Ariffin, (PW1), stated that he had personally sent the exhibits, in two envelopes, marked "S1" and "S2" respectively to the Chemistry Department, "S1" consisting of substances suspected to be heroin and "S2", the weighing scale of its case, (container). He produced the acknowledgment receipt he received from the chemist. On 14 April 1984, he received the said exhibits back from the chemist with chemist's reports in respect of the said "S1" and "S2" and marked by the Court respectively as P25 and P26. He further said, in regard to them: "Both P25 and P26 were served by DPC Yunan at Taiping prison. On the same date in the evening, I received P25 and P26 with acknowledgment of receipt signed by the accused on both original and copy of each of the reports. This is the acknowledgment."

Exhibit P25 left one in no doubt that the substances analysed by the chemist were heroin and P26 stated that traces of a substance which the said case (container) for the weighing scale or instrument was said to contain, were in fact heroin.

It is to be borne in mind that one would expect DPC Yunan to be called because it was he, and not Insp. Mohd. Sakri who had served the chemist's reports, (P25 and P26), on the accused. When the prosecution closed its case, learned defence Counsel informed the Court that he would reserve his submission till the end of the whole case. The Court then recessed, if I am not mistaken, for a short while to consider whether there was a *prima facie* case for the defence to be called.

While going through the notes of evidence, it was found that the said DPC Yunan had never given evidence about the service by him of P25 and P26 on the accused.

a When hearing resumed, the Court drew the attention of the learned Deputy to the above matter. He very promptly applied for leave under s. 425 of the Criminal Procedure Code for the Court to summon the said DPC Yunan, and he appeared to be as surprised as the Court, and the learned defence Counsel, who had chosen, it will be remembered, not to make a submission of no case to answer earlier. Learned defence Counsel objected vigorously to the application for such leave.

b Learned defence Counsel submitted to the effect that if DPC Yunan was not called, Insp. Sakri's evidence about service of P25 and P26 on the accused would be hearsay evidence. DPC Yunan, to make the matter worse, was not even offered to the defence at the close of prosecution case, and that oversight by the learned Deputy "could not be converted into something prejudicial to the accused who was fighting for his life", and if the learned Deputy was excused from this oversight, the result might be the death of the accused. Section 425, relied on by the prosecution, conferred a discretion to be exercised judicially, not after the close of the prosecution case but before such close of the prosecution case. He urged the Court not to call the additional witness, i.e., DPC Yunan.

d The learned Deputy submitted that if it was essential to the just decision of the case, the Court had a discretion under the said s. 425 which did not say whether the discretion should be exercised before or after the close of prosecution case. He cited *Ramli bin Kechik v. PP* [1986] CLJ (Rep) 243. He also cited the unreported case of *PP v. Yeoh Chuan Joo* where Shaik Daud J invoked the same section by recalling two witnesses after the prosecution case. He urged the Court to allow the application.

e I must mention that the learned Deputy who had conducted other cases before me, is undoubtedly a competent prosecuting Counsel, very efficient but fair. The failure to call DPC Yunan, was entirely a matter of pure inadvertence and all I can say is that a mistake will happen to the most careful of men.

f The system in our criminal trials is adversarial, and it behoves the Court, from its inherent nature, to take no active part in proving or disproving any essential fact for the prosecution or defence, in order to maintain its impartiality on the basis of which, public confidence is cultivated, and on such public confidence, the whole judiciary is rooted.

Again, the cardinal rule is that the prosecution must prove every ingredient of the offence before an accused person is called upon to enter on his defence. To prove any ingredient, there must be sufficient evidence, irrespective of whether it is required or not to prove such an ingredient beyond a reasonable doubt.

g In my judgment, the service of P25 and P26, (the chemist's reports), had not been sufficiently proved at the close of the prosecution case because DPC Yunan who served them on the accused had not come forward to testify the same. Such a glaring gap in the chain of the prosecution case could not be ignored or filled up by the evidence of Insp. Mohd. Sakri whose evidence, in particular, as comprised in the quoted passage - the vital and actual evidence about service of P25 and P26, would appear to be hearsay evidence and therefore

h would have to be eradicated from the Court's mind when the prosecution case closed without calling DPC Yunan.

Without such evidence, there was no evidence of service of P25 and P26 on the accused, and neither the chemist was called to the stand, the position after the close of prosecution was tantamount to having no evidence that the suspected substances and the traces of some

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substance found on the container or case for the weighing scale were in fact heroin. There was no sufficient evidence to prove the essential ingredient that the substances the accused was alleged to have trafficked in, were in fact heroin.

The next question that arose was whether I should exercise my discretion in invoking s. 425. The cardinal rule about the prosecution having had to have sufficient evidence to prove every ingredient of the offence by the close of the prosecution case, was clearly broken in this case by a most unfortunate oversight. Viscount Sankey LC in *Maxwell v. The Director of Public Prosecutions* [1935] AC 309, 323, had this to say:

It must be remembered that the whole policy of English Criminal Law has been to see that as against the prisoner every rule in this favour is observed and that no rule is broken so as to prejudice the chance of the jury trying the true issues. The sanction for the observance of the rules of evidence in criminal cases is that, if they are broken in any case, the conviction may be quashed ... It is often better that one guilty man should escape than that the general rules evolved by the dictates of justice for the conduct of criminal prosecutions should be disregarded and discredited.

The spirit of the criminal law was thus highlighted, and the quoted passage should, in my view, prevail over the oft-quoted dictum that there is justice also for the victim of the crime, apart from justice for the accused. The statement of Viscount Sankey would be particularly trenchant when a case of capital offence is involved, so that if a mistake is made, and a warrant of execution is carried out, it is absolutely irreversible.

Having regard to all the circumstances, including my view on the effect of our system of trial being adversarial, I did not think I should exercise my discretion by invoking s. 425 of the Criminal Procedure Code, I therefore declined to exercise it.

Having said this, though not strictly necessary, but out of deference to the learned Deputy, I think I ought to comment on the two cases cited by him. The first case of *Ramli bin Kechik* is distinguishable, because s. 425 was invoked during the course of prosecution case and not after its close. To invoke the s. 425 after the close of prosecution case would, in my view, amount to the Court descending to the arena. The second unreported case is also distinguishable because it was concerned with recall of witnesses.

In the circumstances, I acquitted and discharged the accused without calling for his defence.

Also found at [1987] 1 CLJ 299

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